SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

No. 71-250

October Term, 1971

BARTON BAKER, an attorney,

Petitioner,

v.

MONROE COUNTY BAR ASSOCIATION,

Respondent.

RESPONDENT'S BRIEF

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BATAVIA TIMES, LAW PRINTERS,
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INDEX.

	PAGE
Statement	1
POINT I. The constitutional protection of free speech is not necessarily available to an attorney as a defense in a disciplinary proceeding	3
POINT II. Malice found as a fact deprives Petitioner of the constitutional protection if otherwise available	4
Conclusion	4

TABLE OF CASES.

Amont v. Thompson, 390 U. S. 727/732	4
Beckley v. Hanks, 389 U. S. 81	3
Garrison v. Louisiana, 379 U. S. 64	3, 4
N. Y. Times v. Sullivan, 376 U. S. 254, 279-280	3, 4
Pickering v. Board, 391 U. S. 563	3
Puentes v. Board, 392 U. S. 1341 reversing 18 N. Y. 2d 906, see 24 N. Y. 2d 996	3
Schenk v. United States, 249 U. S. 47, 52	3

MISCELLANEOUS.

Canons of Professional Ethics, Canon 1	3

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RESPONDENT'S BRIEF

Respondent, Monroe County Bar Association, respectfully prays that the Petition for a writ of certiorari be denied.

Statement

The material and relevant facts underlying this disciplinary proceeding and the evidence adduced at the hearing before the Referee have been extensively reviewed by the Referee in his report annexed to the Petition as Appendix A and by the Appellate Division in the opinion annexed to the Petition as Appendix B. No further discussion appears to be necessary, except to clarify some possible wrong impressions which might result from statements contained in the Petition.

Petitioner in his "Statement" places great emphasis on the alleged discrepancy between the amount of the disputed transfers and the amount of the settlement. On the basis of the value of One Thousand (1,000) shares of Eastman Kodak stock at One Hundred Four Thousand Dollars ($104,000.00) at the time of transfer (Page 4), he computes the total disputed transfers as not more than One Hundred Sixty Thousand Dollars ($160,000.00) (Page 5). He therefore characterizes as a "widely exaggerated figure" the Surrogate's statement that upwards of Three Hundred Thousand Dollars ($300,000.00) was involved (Page 5).

Petitioner appears to overlook the fact that between the time of transfer in 1962 and the settlement in 1966 the value of One Thousand (1,000) shares of Eastman Kodak stock had increased (Appendix A—Page 11).

Petitioner also emphasizes that the objectants received the entire amount of the settlement although they were entitled to no more than 4/15 thereof (Page 5).

Petitioner appears to ignore the fact that the amount of settlement, to wit approximately Seventy-five Thousand Dollars ($75,000.00), represented only 4/15 of the value of the disputed transfers at the time of settlement. The objecting parties therefore only received their proportionate share of the total amount in dispute. The additional sum of Forty-six Thousand Dollars ($46,000.00) were attorneys fees which customarily would have had to be paid by the executor if he had been surcharged after trial.

Petitioner also states that his statement as to his reason for making the statements under attack was nowhere impeached (Page 8). The Referee found that Petitioner's

statements, were "filed without reason in fact or law" (Appendix A—Page 18).

Aside from these references to the facts, Respondent respectfully submits that Petitioner is not protected by a constitutional right of free speech under the First and Fourteenth Amendments to the United States Constitution.

POINT I

The constitutional protection of free speech is not necessarily available to an attorney as a defense in a disciplinary proceeding.

The cases cited by Petitioner, to wit *N. Y. Times v. Sullivan*, 376 U. S. 254, 279-280; *Garrison v. Louisiana*, 379 U. S. 64; *Beckley v. Hanks*, 389 U. S. 81; *Pickering v. Board*, 391 U. S. 563; *Puentes v. Board*, 392 U. S. 1341 reversing 18 N. Y. 2d 906, see 24 N. Y. 2d 996, have no application to a disciplinary proceeding against an attorney. Only Pickering and Puentes involve disciplinary proceedings, but they deal with teachers.

The distinction clearly is in the availability of review procedures and the standard of conduct established by the Canons of Ethics for attorneys, and the absence thereof for teachers (Appendix A—Pages 19 and 20).

The right to free speech is not unlimited and absolute (*Schenk vs. United States*, 249 U. S. 47, 52).

A lawyer, taking the oath of office and subscribing to the Canons of Professional Ethics, voluntarily limits his right of free speech. He agrees to submit his grievances to proper authority, but not otherwise (Canons of Professional Ethics, Canon 1).

POINT II

Malice found as a fact deprives Petitioner of the constitutional protection if otherwise available.

This Court has defined malice, so as to overcome the defense of constitutionally protected free speech as the making of a statement with knowledge of its falsity or with reckless disregard of whether it was true or false (N. Y. Times Company v. Sullivan, 376 U. S. 254) or making a false publication with a "high degree of awareness of probable falsity" (Garrison vs. Louisiana, 369 U. S. 64/74).

The existence or absence of malice is to be determined by the finder of fact (Amont vs. Thompson, 390 U. S. 727/732).

Both the Referee and the Appellate Division have found as a matter of fact that the Petitioner was prompted by malice (Appendix A and B). By its affirmance, the Court of Appeals agreed (Appendix C).

Conclusion

For the foregoing reasons the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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